FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Zimmer 2000, Inc., and	)	
Maria Chappa, in her official capacity as treasurer,	)	MUR 5026
Larry Weitzner,	)	
Jamestown Associates LLC,	)	
Tom Blakely, and	)	
Fox Media Consulting LLC	)	

STATEMENT OF REASONS OF COMMISSIONER DAVID M. MASON

This matter involves allegations that a nonprofit organization coordinated its communications with a federal candidate in a period prior to passage of the Bipartisan Campaign Reform Act of 2002 ("BCRA") and revision of the Federal Election Commission's coordination rules mandated by that act.

On February 3, 2004, the Commission voted 4 to 2 to find reason to believe that a violation of the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 431 *et seq.*, occurred. *See id.* § 437g(a)(2).[1] Then on October 6, 2005, the Commission voted 4 to 0 to find probable cause that a violation occurred, take no further action, and close the file. *See id.* § (a)(4)(1).[2]

As a matter of consistent and well-settled, albeit controversial, policy, the Commission was not pursuing claims of non-express-advocacy coordination prior to passage of BCRA. As the complaint alleged that a non-express-advocacy communication had been coordinated with the Zimmer campaign, I voted to dismiss this matter without an investigation. Following the investigation which nonetheless was approved, I voted to find probable cause but take no further action as a means of disposing of the matter consistent with my view that it would have been inappropriate for the Commission to seek penalties for activity it had failed to pursue in numerous other matters. Since the activity at issue occurred, the law, our regulations and jurisprudence have changed in significant ways such that it also would have been pointless to pursue settlement of this matter to establish what the prevailing law should have been five years ago.

I. BACKGROUND

[1] Commissioners McDonald, Thomas, Toner and Weintraub voted "yes." Commissioners Mason and Smith voted "no."

[2] Commissioners Mason, McDonald, Thomas and Weintraub voted "yes," and Commissioner Toner abstained. Because Commissioner Smith had left the Commission, only five Commissioners participated in the later vote.

Dick Zimmer ran in a primary for the United States House of Representatives in 2000, and Respondent Zimmer 2000, Inc., was his authorized committee.[3]

Respondent Jamestown Associates, LLC, with Respondent Larry Weitzner as president, was Zimmer 2000's campaign consultant for the primary.[4] Respondent Tom Blakely was a registered agent[5] and the sole member of Respondent Fox Media Consulting.[6]

The complaint alleged that Zimmer, his campaign, and agents "coordinated" communications made by New Jersey Citizens for Tax Reform ("NJCTR"). Respondents deny that any coordination with Zimmer or the campaign took place and deny that persons who did take part in the NJCTR communications were agents of the Zimmer campaign. The investigation did not conclusively settle the agency dispute.[7]

FECA provides that

> expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate .... .

2 U.S.C. § 441a(a)(7)(B)(i) (2002). *Buckley v. Valeo* generally limited the term "expenditure" to express advocacy. *FEC v. Massachusetts Citizens for Life,* 479 U.S. 238, 249 (1986) ("*MCFL*") (citing *Buckley v. Valeo,* 424 U.S. 1, 80 (1976)); *see also Buckley,* 424 U.S. at 39-44.[8]

As the general counsel's office notes, the ads at issue in this matter contained only issue advocacy, not express advocacy.[9]

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[3] First General Counsel's Report ("GCR") at 2 (Jan. 14, 200[4]).

[4] *Id* at 2-3, *see* Resps.' Jt. Br in Resp. to Gen. Counsel's Brs at 10 (Aug. 4, 2005) ("RJB")

[5] First GCR at 3.

[6] RJB at 8

[7] *See, e g*, Third GCR at 2-5, 7, 27-30 (Sept. 26, 2005).

[8] *Buckley* refers repeatedly to the express-advocacy test, describing the test in eight instances with the following words: (1) "explicit words of advocacy," 424 U.S. at 43, (2) "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office," *id* at 44; (3) "communications containing express words of advocacy of election or defeat," *id* n.52; (4) "expenditures that in express terms advocate the election or defeat of a clearly identified candidate," *id.* at 45; (5) "express advocacy of election or defeat," *id.*; (6) "funds used for communications that expressly advocate the election or defeat of a clearly identified candidate," *id.* at 80, (7) "expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate," *id.*; and (8) "expenditures that expressly advocate a particular election result." *Id.*

[9] First GCR at 1, 11 n 17; *see id* at 5 (partial text of ad).

II. DISCUSSION

A. Previous Commission Approach on Coordinated Issue Advocacy

The Commission previously adhered to the express-advocacy test in determining whether a particular communication was an expression subject to the coordination restrictions. *See Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986), *cited in FEC v. Colorado Republican Fed. Campaign Comm.*, 839 F.Supp. 1448, 1454 (D. Colo. 1993) (*"Colorado Republican I"*).

Orloski involved a picnic, paid for by corporations, at which a congressman addressed senior citizens. *Id.* at 158-59. The Commission held that for a communication coordinated with a candidate to be an "in-kind" contribution, it must contain express advocacy. *See id.* at 160 (recognizing the Commission's requirement of express advocacy); *id.* at 163 (agreeing with the Commission's position). Although the Court did not hold the express-advocacy test is constitutionally required, the Court did, in light of *Buckley,* uphold the Commission-endorsed test as "logical, reasonable, and consistent with the overall statutory framework." *Id.* at 167.

Orloski supports applying the express-advocacy test to the alleged coordinated communications in this matter. First, the Commission drew the line where the Supreme Court did in *Buckley,* and later in *MCFL*. Second, the line was drawn there for the same reason: the need for a bright-line test. As the *Orloski* Court explained, an "objective, bright-line test" distinguishing the permissible and impermissible enables all involved to follow the law easily. "A subjective test based upon the totality of the circumstances would inevitably curtail permissible conduct." *Id.* at 165. In fact, the Court emphasized that "in this politically-charged area, bright-line tests are virtually mandated even though they may occasionally lead to what appears, at first glance, to be somewhat artificial results." *Id.* at 167.

B. Notice

Even if it were constitutional to regulate the issue advocacy in this matter, the Commission had established through consistent enforcement decisions that it would not regulate non-express-advocacy coordinated communications by the time the issue advocacy in this matter occurred. Thus, Respondents were not on notice that the Commission would do so. For this reason, the Commission has declined on multiple occasions to pursue coordinated issue advocacy. *See, e.g., Rhode Island Republican State Central Comm., et al.,* MUR 5369, SOR of Vice Chairman Smith and Comm'rs Mason and Toner at 3-5 (Fed. Election Comm'n Aug. 15, 2003) (collecting authorities); *id.,* SOR of Chair Weintraub at 1 (undated); *In re New York Senate 2000,* MUR 4994, SOR of Chairman Mason and Comm'rs Smith and Wold at 2-3 (Fed. Election Comm'n Jan. 11, 2002) (collecting authorities); *In re Dole for President, Inc., et al.,* MURs 4553, 4671, 4407, 4544 & 4713, SOR of Comm'r Sandstrom at 2-3 (Fed. Election Comm'n June 21, 2000). Indeed, before BCRA "the Commission's actions [left] express advocacy as the de facto content standard for determining whether communications are for the purpose of influencing an election, even when coordination is present." *In re Alabama Republican*

Party, et al., MUR 4538, SOR of Chairman Mason and Comm'r Smith at 7 (Fed. Election Comm'n May 23, 2002).

Therefore, this matter is due to be dismissed as a matter of prosecutorial discretion. *See Heckler v. Chaney*, 470 U.S. 821 (1985).

C. Congressional Recognition of the Limit on the Term "Expenditure"

After *Buckley*, Congress, aware that the Supreme Court had limited the term "expenditure" to express advocacy, *MCFL*, 479 U.S. at 249 (citing *Buckley*, 424 U.S. at 80), amended 2 U.S.C. § 441a(a)(7)(B)(i) to provide that coordinated "expenditures" shall be considered contributions to candidates. This post-*Buckley*, pre-BCRA use of "expenditure" indicates that at the time, coordinated communications had to be express advocacy before they could be regulated. *In the Coalition, Nat'l Republican Congressional Comm.*, MUR 4624, SOR of Comm'r Smith at 6 (Fed. Election Comm'n Nov. 6, 2001).

D. BCRA and the Value of a "Test Case"

If there was any doubt before BCRA that pre-BCRA law did not regulate issue advocacy, even when it was coordinated, then BCRA resolved the doubt by specifically regulating particular issue advocacy. Because the old law, rather than the new law, applies in this matter, holding that the old law allows regulating issue advocacy in this matter would invite a federal-court challenge over law that has been amended.[10] There would be little value in such an action. *See Rhode Island Republican, supra*, SOR of Vice Chairman Smith and Comm'rs Mason & Toner at 5 & n.20 (citing 2 U.S.C. § 441a(a)(7)(C); 11 C.F.R. § 109.21(c)). Accordingly, this matter is due to be dismissed as a matter of prosecutorial discretion. *See Heckler v. Chaney, supra.*

III. CONCLUSION

For the foregoing reasons, it was appropriate for the Commission to take no further action and close the file in this matter.

November 3, 2005

David M. Mason
Commissioner

[10] *See, e.g.*, RJB at 1 n.1, 4 n.6.